Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

C. Keith Schafer, John Twiehaus, Robert O. Muether, Jacqueline Howard, Kelly Shaw, and Peggy Dunlap, *Petitioners*,

v.

Wayne and Alice Kennedy, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Involuntarily committed mental patients have due process rights to certain services pursuant to *Youngberg v. Romeo*, 457 U.S. 307 (1982). The Kennedys are parents of a *voluntary* mental patient who committed suicide during her stay in the State of Missouri's mental health facility. The Eighth Circuit relied on Missouri statutes (similar to those in nearly every state) to hold that the Kennedys' daughter had the same due process rights as an involuntary patient on the ground that she had "effectively become" an involuntarily committed patient merely because the state possessed -- but undisputedly did not exercise -- the authority to commit her involuntarily.

The questions presented are:

1. Does a voluntary mental patient at a state facility have the same due process rights as an involuntarily committed mental patient solely because the state possessed, but did not exercise, the power to commit the patient involuntarily, thus triggering state officials' potential § 1983 liability for the patient's injuries?

2. Does an individual have a due process right to be involuntarily committed to a mental health facility?

3. Do state officials lose qualified immunity protection from a claim based on an unprecedented legal theory (here, that the voluntary mental patient had become a constructive involuntary patient) because that theory is purportedly "not obscure"?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are found in the caption of this Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

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C. KEITH SCHAFER, JOHN TWIEHAUS, ROBERT O. MUETHER, JACQUELINE HOWARD, KELLY SHAW, and PEGGY DUNLAP, *Petitioners*,

v.

WAYNE AND ALICE KENNEDY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

C. Keith Schafer, John Twiehaus, Robert O. Muether, Jacqueline Howard, Kelly Shaw, and Peggy Dunlap, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A-1 to A-14) is reported at 71 F.3d 292. The Order of the Eighth Circuit denying the petition for rehearing and suggestions for rehearing en banc (five of eleven judges dissenting) is noted at 71 F.3d 292 (App. A-15). The opinion of the district court (App. A-16 to A-23) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on December 4, 1995, and denied the petition for rehearing and suggestions for rehearing en banc on January 31, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 632.155, Missouri Revised Statutes

Release of voluntary minor patients, consent required -- may be involuntarily detained, when, procedure. --

1. A voluntary patient who is a minor and who requests his release either orally or in writing, or whose release is requested in writing to the head of the facility by his parent, spouse, adult next of kin, or person entitled to his custody, shall be released immediately; except, that if the patient was admitted on the application of another person, his release shall be conditioned upon receiving the consent of the person applying for his admission.

2. If the head of the mental health facility determines that the minor is mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others, the head of the facility may refuse the release. The mental health facility may detain the minor only if a mental health coordinator, a licensed physician, a mental health professional or a registered professional nurse designated by the facility and approved by the department completes an application for detention for evaluation and treatment to begin the involuntary detention of the minor under this chapter or, if appropriate, the minor is detained in the facility under the provisions of chapter 211, RSMo.

Section 632.300, Missouri Revised Statutes

Procedure when physical harm possibilities are alleged. --

1. When a mental health coordinator receives information alleging that a person, as the result of a mental

disorder, presents a likelihood of serious physical harm to himself or other, he shall:

(1) Conduct an investigation;

(2) Evaluate the allegations and the data developed by investigation; and

(3) Evaluate the reliability and credibility of all sources of information.

2. If, as the result of personal observation or investigation, the mental health coordinator has reasonable cause to believe that such person is mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others, the mental health coordinator may file an application with the court having probate jurisdiction pursuant to the provisions of section 632.305; provided, however, that should the mental health coordinator have reasonable cause to believe, as the result of personal observation or investigation, that the likelihood of serious physical harm by such person to himself or other as a result of a mental disorder is imminent unless the person is immediately taken into custody, the mental health coordinator shall request a peace officer to take or cause such person to be taken into custody and transported to a mental health facility in accordance with the provisions of subsection 3 of section 632.305.

3. If the mental health coordinator determines that involuntary commitment is not appropriate, he should inform either the person, his family or friends about those public and private agencies and courts which might be of assistance.

Section 632.305.3, Missouri Revised Statutes

Detention for evaluation and treatment, who may request--procedure--duration--disposition after application. --

A mental health coordinator may request a peace officer to take or a peace officer may take a person into custody for detention for evaluation and treatment for a period not to exceed ninety-six hours only when such mental health coordinator or peace officer has reasonable cause to believe that such person is suffering from a mental disorder and that the likelihood of serious physical harm by such person to himself or others is imminent unless such person is immediately taken into custody. Upon arrival at the mental health facility, the peace officer or mental health coordinator who conveyed such person or caused him to be conveyed shall either present the application for detention for evaluation and treatment upon which the court has issued a finding of probable cause and the respondent was taken into custody or complete an application for initial detention for evaluation and treatment for a period not to exceed ninety-six hours which shall be based upon his own personal observations or investigations and shall contain the information required in subsection 1 of this section.

STATEMENT OF THE CASE

This case stems from an effort to hold state employees personally liable for the suicide of a mentally ill person who was voluntarily admitted to a state treatment facility. The parents of the decedent brought this action in federal court pursuant to 42 U.S.C. § 1983, claiming that they had been deprived of their constitutional rights. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1343(a)(3),(4) (civil rights). The district court granted summary judgment to defendants (state-employed mental health officials). The Eighth Circuit panel reversed in a two-to-one decision.

The decedent, Kathleen Kennedy, an adolescent, had received continuous psychiatric inpatient treatment from private and public facilities. Originally Kathleen was in a private facility. Then, on September 22, 1989, she was admitted into a state facility--the Hawthorn Children's Psychiatric Hospital--pursuant to Mo. Rev. Stat. § 632.110 (1986) (the statutory provision regarding the acceptance of voluntary minors into state mental health facilities). The state makes available psychiatric care to patients such as Kathleen at a reduced rate based on the ability to pay. Mo. Rev. Stat. §§ 630.205, 630.210 (1986). On February 16, 1990, her parents, respondents, availed themselves of the opportunity to request their daughter's release, pursuant to Mo. Rev. Stat. § 622.155 (1986), and Kathleen was released that day. Thereafter, she was admitted to a private hospital. After the insurance coverage would no longer pay for Kathleen's care at the private hospital, her parents applied for Kathleen's readmission to Hawthorn as a voluntary inpatient on October 2, 1991. She was admitted that day.

While at Hawthorn, staff took the precautions of placing her in a "1:1 Constant Staff Supervision" category,

under which patients must be no more than three feet away from a staff member at all times. On April 3, 1992, Kathleen was placed on "Protective Suicide Precautions," a precaution for those patients at moderate or low risk or suicide. Nevertheless, five days later she committed suicide by hanging herself from the air conditioning vent in her room.

At all times Kathleen Kennedy was classified as a voluntary patient at the facility. It is undisputed that the state never took any steps to have her involuntarily committed. The state never took any steps to restrain her liberty.

The parents have not alleged that state employees had any responsibility for the state of Kathleen's mental health leading to her suicide or that the state employees took any affirmative action that led to her suicide. Instead, the parents claim that state employees are liable for their daughter's suicide because Hawthorn was allegedly understaffed both at the specific cottage in which Kathleen resided and at the facility in general. They allege that Hawthorn officials understated their needs to their supervisors outside the facility. In other words, they allege that Hawthorn officials did not try hard enough to get more employees assigned to their facility.[1]

The parents asserted several bases for their claim that the state could be liable for injuries to a mentally ill patient even though the patient was voluntarily admitted. The state

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[1] Named as defendants were C. Keith Schafer (Acting Director of the Missouri Department of Mental Health), Robert O. Muether (Regional Manager of the Eastern Regional Division of Comprehensive Psychiatric Services of the Department of Mental Health), Jacqueline S. Howard (Executive Director of the Hawthorn Children's Psychiatric Hospital, a state mental health facility), Kelly J. Shaw (Director of Nursing at Hawthorn), and Peggy Dunlap (a Nursing Supervisor at Hawthorn).

employees moved for summary judgment in the district court on qualified immunity and substantive grounds. The district court entered judgment in favor of the state employees on the basis that there was no constitutional duty to Kathleen, and alternatively, that qualified immunity applied because there was no clearly established duty owed to a voluntary patient. The court noted that the state employees had taken no affirmative acts to place Kathleen within their custody.

The parents appealed the entry of summary judgment to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 1291. In a two-to-one decision, the panel held that a genuine issue of fact remained as to whether Kathleen Kennedy "may have effectively become an involuntary patient" because of her mental condition at the time of her death and the purported effect of certain statutes. The panel relied upon Mo. Rev. Stat. § 632.155.1 (1986) (procedures for releasing voluntary patients) in finding that an issue remained as to whether Kathleen Kennedy was somehow transformed, at some unknown time prior to her death, from a voluntary to involuntary patient, despite the total absence of an act by any state official with respect to her commitment status.

The panel based this conclusion on the fact that under Missouri law the head of a mental health facility has *discretion* under extremely limited circumstances to depart from the usual mode of granting a release to a voluntarily admitted patient immediately after it has been requested. Mo. Rev. Stat. § 632.155 (App. A-6). Missouri's statute is like that of most states: voluntary patients do not have an unconditional right to immediate release.[2]

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[2] The panel also relied in part on another statute that allows a person to be taken into custody and involuntarily detained for no more than ninety-six hours, again under extremely limited circumstances,

The panel remanded the case to the district court (App. A-9). The defendant state employees sought rehearing en banc, which was denied. Five of the eleven active judges of the Eighth Circuit would have granted the suggestion for rehearing en banc (App. A-15).

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suggesting that this meant it was possible that the facility head would have been required to involuntarily commit Kathleen. (App. A-8, *citing* Mo. Rev. Stat. §§ 632.300.2, 632.305.3 (1986)).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's holding that voluntary mental patients can possess the same substantive due process rights as involuntary patients is flatly at odds with decisions of this Court and at least three federal appellate courts and would impact nearly every state.

In holding that a voluntary admittee to a State mental health facility may possess due process rights, the Eighth Circuit "effectively obliterated the rule [in *DeShaney v. Winnebago Cty. Dep't Soc. Servs.*, 489 U.S. 189, 200 (1989)] that a duty to protect arises only when the State affirmatively exercises its power to restrain a person's liberty against the person's will." App. A-12 (Hansen, J., dissenting).

The Eighth Circuit itself noted the sharp conflict between its holding and those of other circuits. The Eighth Circuit identified three circuits that have refused in the wake of *DeShaney* to extend due process protection to those who voluntarily enter the state's custody (and it identified no courts adopting the Eighth Circuit's view). App. A-5, *citing Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992) (affirming dismissal based on fact that plaintiff's voluntary mental patient status meant that no duty existed); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F. 2d 459 (3d Cir. 1990) (affirming summary judgment based on voluntary status of mentally retarded resident); *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (en banc) (reversing denial of summary judgment motion by defendants; state had no duty to deaf child voluntarily placed in its custody).

This Court has never held that the due process clause gives a constitutional cause of action to patients who voluntarily obtain mental health care from the state based on alleged inadequacy of that care.

But the Eighth Circuit has taken an unprecedented approach that achieves the same result. By creating a new category of patients who had "effectively become" involuntary, the court destroyed the line that limits the federal power to create causes of action against states. State officials can now be personally liable for what they might have or could have done, rather than what they did. The Eighth Circuit opinion "substitutes the mere existence of unexercised State power for the reality of affirmative State action." App. A-12 (Hansen, J., dissenting). When the gates to constitutional liability are flung open that wide, state mental health officials have to assume that anyone can be transformed into an involuntary patient. The long-standing distinction has been lost.

The implications of this mistaken theory are far-reaching. Most or all states offer assistance to the mentally ill on a voluntary basis. At least forty-two other jurisdictions expressly place conditions on a voluntary patient's right to leave the treatment facility.[3]

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[3] Alaska Stat. § 47.30.695 (1995); Ariz. Rev. Stat. Ann. § 36-519 (1993); Ark. Code Ann. § 20-47-204(2) (Michie 1991); Colo. Rev. Stat. Ann. § 27-10-103 (West 1989); Conn. Gen. Stat. § 17a-506(e) (West Supp. 1996); Del. Code Ann. tit. 16, § 5123 (1995); D.C. Code Ann. §§ 21-512, 21-513, 21-528 (1989); Fla. Stat. Ann. § 394.465(2) (West Supp. 1996); Ga. Code Ann. § 37-3-22 (1995); Haw. Rev. Stat. § 334-60.1 (1991); Idaho Code § 66-320 (1989); Ill. Ann. Stat. ch. 405, para. 5/3-508 (1993); Ind. Code Ann. § 12-26-3-5 (Burns 1995); Iowa Code Ann. § 229.4 (West 1994); Ky. Rev. Stat. Ann. § 202A.021 (Michie/Bobbs-Merrill 1995); La. Rev. Stat. Ann. § 28:52.2.B (West 1989); Me. Rev. Stat. Ann. tit. 34-B, § 3832 (West 1988); Md. Code Ann., Health-Gen. § 10-803 (1994); Mass. Ann. Laws ch. 123, § 11 (Law.

Generally, governments have no duty to assist the mentally ill. The exception to this rule occurs when the state deprives a person of liberty to care for himself. *DeShaney*, 489 U.S. at 199-200; *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). But the Eighth Circuit "obliterated" these constitutional principles and found that a person voluntarily admitted as a patient at a state hospital may be entitled to due process rights even though the state did nothing to restrict the patient's liberty. App. A-12 (Hansen, J. dissenting).

In addition to the conflicting circuit court decisions cited above and by the Eighth Circuit, other courts have reached the conclusion that no substantive due process right to a particular type of living or treatment condition is implicated where a voluntary patient seeks the assistance of state mental health facilities. *E.g.*, *Ridlen v. Four County Counseling Center*, 809 F. Supp. 1343 (N.D. Ind. 1992); *Williams v. Hartman*, 597 N.E.2d 1024, 1027-28 (Mass. 1992); *Jordan v. Tenn.*, 738 F. Supp. 258, 259 (M.D. Tenn. 1990) (severely retarded ten-year-old who was voluntarily

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Co-op. 1989); Mich. Stat. Ann. §§ 14.800(419)-(420) (Law. Co-op. 1995); Minn. Stat. Ann. § 253B.04 (West 1994); Miss. Code Ann. § 41-21-103 (1993); Mont. Code Ann. § 53-21-111-112 (1995); Neb. Rev. Stat. § 83-1019 (1994); N.H. Rev. Stat. Ann. § 135-C:17 (1990); N.J. Rev. Stat. Ann. § 30:4-27.20 (West Supp. 1995); N.M. Stat. Ann. § 43-1-14 (Michie 1993); N.Y. Mental Hyg. Law § 9.13(b) (McKinney 1996); N.C. Gen. Stat. §§ 122C-211, 122C-221, 122C-224.7 (1993); N.D. Cent. Code § 25-03.1-06 (1995); Ohio Rev. Code Ann. § 5122.03 (Baldwin 1994); Okla. Stat. Ann. Cit. 43A, § 5-309 (West 1990); Or. Rev. Stat. § 426.220 (1995); R.I. Gen. Laws § 40.1-5-6(3) (1990); S.C. Code Ann. §§ 44-17-330, 44-24-40 (Law. Co-op. Supp. 1995); S.D. Codified Laws Ann. § 27A-8-10.1 (1992); Tenn. Code Ann. § 33-6-101(c) (Supp. 1995); Tex. Health & Safety Code Ann. § 572.004 (West Supp. 1996); Utah Code Ann. § 62A-12-230 (1993); Wash. Rev. Code Ann. § 71.05.050 (West 1992); W. Va. Code § 27-4-3 (1992); Wis. Stat. Ann. § 51.13(7) (West 1987).

admitted to a state-run facility drowned while in state custody; court relied on *DeShaney* in granting summary judgment for defendants because of the patient's voluntary status and the fact that the state had not taken an affirmative action to put the child "in harms' way").

Other circuits are in conflict with the Eighth Circuit's reasoning based on a line of similar cases. Several circuits have held that compulsory school attendance does not create sufficient restraints by the state, and therefore no constitutional duty arises. *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993); *Johnson v. Dallas Ind. Sch. Dist.*, 38 F.3d 198, 203 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1361 (1995); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993); *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994). Thus, between these cases and those cited by the panel opinion, at least six of the circuits are in conflict with the Eighth Circuit's novel ruling.

The Eighth Circuit's theory is nothing less than a roundabout way of destroying the voluntary/involuntary distinction in determining the circumstances under which the federal constitution imposes a duty upon states to provide a certain level of social services to its citizens. The Eighth Circuit would allow state employees to be liable *if* the patient would have been detained and *if* she or her parents had requested her release. But "the record in this case contains no assertion or evidence that [Ms. Kennedy's] course of treatment was against [her] will or her parents' will, or that her parents sought to remove [her] and were denied release from this course of treatment." App. A-11 (Hansen, J. dissenting).

The purported basis for the court's logic was found in state statutes. Under Mo. Rev. Stat. § 632.155.1, ordinarily a voluntary patient "shall be released immediately" upon request. A narrow exception can exist. The head of a mental health facility is afforded the *discretion* to refuse to honor a request for the release of a voluntary patient if certain designated mental health professionals complete an application for involuntary detention and the head of the mental health facility determines that the patient "is mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others." Mo. Rev. Stat. § 632.155.2. The Eighth Circuit concluded that because the patient's mental state *may* have been such that the head of the facility *may* have had the power to detain her *if* there been a request for her release and he *may* have exercised that power, the patient should have the rights of a person who is actually deprived of his or her liberty.

The Eighth Circuit also referred to an even more remote statute that gives a mental health coordinator the power to petition a court for an individual's involuntary commitment (whether or not the individual is presently in the custody of the state). The statute goes on to provide that the mental health coordinator shall ask a peace officer to take a person to a mental health facility *only* if there is *imminent* likelihood of serious physical harm as a result of a mental disorder. Mo. Rev. Stat. § 632.300.2. Even if this power is exercised, the person can be detained without an adjudication for only ninety-six hours. Mo. Rev. Stat. § 632.305.3.[4]

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[4] It is far from clear that there is ever a mandatory duty to take custody of someone – the statute also provides direction to the mental health coordinator as to what to do if the coordinator determines that involuntary commitment is not appropriate. Mo. Rev. Stat. § 632.300.3. Also there are no Missouri cases interpreting the statute as mandating involuntary commitment.

Thus, under the constructive-involuntary commitment status created by the Eighth Circuit, questions of constitutional duty turn on what the state might hypothetically have done, not what the state affirmatively did to restrain a person's liberty. This approach has not been adopted before, and with good reason. *DeShaney* stated that mere expressions of intent by the state do not trigger substantive due process. 489 U.S. at 200. Once we reach the point where unexercised power determines whether a constitutional duty arises, we have lost sight of the basic constitutional framework: the presumption is that the federal constitution does not create tort-like liability when a state provides medical services to its citizens. The exception exists only when the state puts persons in the position where they have no choice of where to go for their services, such as in the case of prisoners and involuntarily committed mental patients. *Youngberg*, 457 U.S. 307; *Estelle*, 429 U.S. 97. The Eighth Circuit's analysis ignores these bedrock principles and lets the exception swallow the rule.

II. The Eighth Circuit's "constructive-involuntary" status for mental patients would create an incentive in most states to deny care to the mentally ill. That incentive should not be allowed to remain in place, and it is certainly not mandated by the due process clause.

The Eighth Circuit's decision would create an incentive to Missouri and other similarly-situated states to decrease the number of voluntary mentally ill persons the state serves, often at little or no cost to the patient. Patients who seek help and who might benefit from that help may be turned away because the State reasonably determines that the risk of liability is too great to jeopardize the availability of resources to care for other mentally ill persons. Regardless of what decision is made in a particular case, the fact that limited state resources are at risk means something has to give.

It is self-evident that resources available to assist the mentally ill are finite. As explained above, governments ordinarily have no duty to assist the mentally ill, unless the state deprives a person of the liberty to care for himself. *DeShaney*, 489 U.S. 189; *Youngberg*, 457 U.S. at 315-16; *Estelle v. Gamble*, 429 U.S. at 103-04 (1976). *See Maher v. Roe*, 432 U.S. 464, 469 (1977) (states have no duty to provide medical treatment to indigents). States are thus on notice that if they choose to deprive a person of liberty through involuntary confinement, they have to provide to that person a certain level of care.

Conversely, prior to the Eighth Circuit's opinion, the states would have believed that they could offer assistance to the mentally ill (at whatever level state resources may allow) when those persons wanted to take advantage of that assistance, without facing the prospect of expensive litigation

and potential constitutional liability. Because the Eighth Circuit's flawed constructive involuntary status can be ascertained only after the fact, the states must always assume that liability can exist if the voluntary patient is admitted. From the point of view of the mental health administrator allocating limited resources, the creation of a constructive-involuntary commitment status is the same as extending due process rights wholesale to all voluntary patients.

Thus, under the rule of law previously announced in *DeShaney*, even if a facility is not staffed or maintained at the level that might exist in private hospitals or that might be optimally desirable, the state can offer its citizens the services it is able to muster without fear of losing significant resources in the future to § 1983 lawsuits. When a state chooses to provide assistance in such circumstances, some mentally ill persons undoubtedly will be helped. For some mentally ill persons, that aid may save their lives.

But the Eighth Circuit's opinion dramatically alters that calculus when the mentally ill or their families come knocking on the door. The effect of that opinion is to require the state decision-maker to consider whether helping a voluntary patient will skew the allocation of resources in a less efficient way. For instance, money spent on judgments cannot be spent on the mentally ill, and resources diverted to voluntary patients to avoid constructive-involuntary liability are resources taken from those whom state mental health officials may believe need it most.

While we cannot know how these scenarios would play out, the incentives created by the Eighth Circuit's opinion are undeniable. Indeed, the whole point of the Kennedys' lawsuit is a declaration that state resources were misallocated and that the state defendants allegedly did not

try hard enough to get their budget increased (and, conversely, another department's budget decreased).

To be sure, one might argue that it is good policy to change Missouri's existing funding priorities. States may choose to do that by statute, by common law tort principles, or by abrogation of their own sovereign immunity. Indeed, Missouri has chosen to abrogate sovereign immunity in some circumstances, while imposing some limits on the reach into the state's assets (such as barring punitive damages and imposing a $1,000,000 cap per occurrence). Mo. Rev. Stat. §§ 537.600, 537.610 (1994).

In a federal lawsuit such as this one, however, the issue of what is good social policy is not for the courts to decide. The issue is the reach of the phrase "nor shall any state deprive any person of life, liberty or property without due process of law." There is no historical or common sense reading of that clause that leads one to conclude that states may be obligated to pay judgments when they are unsuccessful in providing free or low-cost treatment to suicidal, desperate people who cannot or do not wish to pay for private care. The due process clause should not be interpreted in a way that sends a message to states and their employees that they run a risk of a constitutional violation if they are unsuccessful in efforts to help people who need help. But if the Eighth Circuit's interpretation stands, that would be the result. The Eighth Circuit's ruling may well cause Missouri's mentally ill citizens to suffer. That was not the intent of the framers of the Fourteenth Amendment.

And it is no answer to say that the state must simply spend more on the mentally ill. This is a constitutional case, and the federal constitution does not impose a duty on states to provide services to mentally ill patients, much less provide services at a certain level, as defined by a district court or a

district court jury. Moreover, even when a state's entire budget or the citizenry's complete resources are considered, the governmental resources are finite. If more money is spent on the mentally ill, either (1) less money will be spent on education, welfare, Medicaid, or other state programs, or (2) taxes must be raised. The consequence of the Eighth Circuit's opinion is that the courts are essentially telling the state to spend more money on voluntary patients. That declaration violates the settled principle that the "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney*, 489 U.S. at 196. The Eighth Circuit's decision also purports to tell the states how to allocate their limited resources among social programs or other needs. That level of federal court intervention violates principles enshrined in the Tenth Amendment, the Eleventh Amendment and our essential system of federalism.

III. The Eighth Circuit's analysis would create an unprecedented right to be committed that would affect every state.

The Eighth Circuit's analysis turns due process jurisprudence on its head. The appellate court would allow a cause of action based on the unexercised right to confine someone. The dissent called this the unprecedented right to be committed (App. A-12). In other words, the Eighth Circuit has created a liberty interest in having one's liberty taken away.

Aside from the oxymoronic nature of this holding, it is also inconsistent with substantive and procedural due process principles. To be sure, neither the parents nor the appellate court contend that they were denied adequate procedural protections. To the contrary, the premise of the

Eighth Circuit's constructive-involuntary commitment argument is that there is a right to be restrained *without* a hearing (or even a request for one).

The decision's substantive due process underpinnings are no firmer. First, substantive due process rights are limited. They "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807, 812 (1994). As a result, this Court "exercise[s] the utmost care whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993), *citing Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). The general framework of a substantive due process analysis is as follows: (1) there is a "fundamental" right, (2) legislation entrenching upon this fundamental right is subjected to strict scrutiny, and (3) the legislation generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. *Foucha v. Louisiana*, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting).

In this case, the paradoxical "right" would be the right to have liberty restrained. Ordinarily when there is an assertion that a right implicating liberty is so fundamental that it triggers a substantive due process analysis, the complained-of conduct is the *taking* of liberty or freedom of choice in certain matters. Moreover, the complaint does not attack the statutory framework or seek to expose it to a "strict scrutiny" analysis. The claim in this case simply does not fall into a substantive due process analysis.

Second, the Eighth Circuit's analysis would create different substantive due process rights from state to state. Reliance upon state statutes to create substantive due process entitlements will lead to uncertainty in the law and undesirable variation among the states.

For purposes of this Petition for Writ of Certiorari, the differences in the statutes are less important than the similarities. As noted above, at least forty-two state statutes expressly provide for delay or conditions when a voluntary patient seeks release.[5] Generally, the statutes provide for some delay to give mental health professionals time to take affirmative steps to convert a patient to involuntary status. Moreover, all states have an involuntary commitment procedure, so even in the remaining jurisdictions that do not expressly refer to a change to involuntary status, the possibility of conversion exists. Therefore, if the principles underlying the Eighth Circuit's decision were law, they would affect every state and the District of Columbia. And, as explained in the previous section, that means the federal courts would be setting the priorities in the allocations of finite state resources coast-to-coast.

The Eighth Circuit's opinion allows unexercised power to become a substitute for the requirement that an affirmative act on the part of the state is necessary to create a substantive due process right. It is undisputed that there was never any attempt by the state or its officials to restrain Kathleen Kennedy's liberty. The only basis for finding such restraint exists in the Eighth Circuit's flawed interpretation of a state statute applied in hindsight to Kathleen Kennedy's condition. The appellate court's reasoning is unprecedented and would render *DeShaney* and *Youngberg* meaningless.

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[5] See n. 3, *supra*.

IV. The Eighth Circuit's opinion eviscerates the qualified immunity doctrine by allowing a plaintiff to override that immunity based on a theory not previously found in any published opinion so long as that novel theory is "not obscure."

The Eighth Circuit did something that, to petitioners' awareness, no federal court has ever done in any published opinion: it held that a person who was admitted as a voluntary patient and always classified as a voluntary patient acquired the rights of an *involuntary* patient simply because the state could have (but did not) restrain the individual's liberty. The Eighth Circuit's position was totally unprecedented and unpredictable. "[R]esearch has revealed no cases indicating constitutional liability in this type of situation after *DeShaney* and prior to the filing of this opinion." App. A-13-14 (Hansen, J., dissenting).

Until the Eighth Circuit's opinion, it seemed that the principles of qualified immunity were firmly established. State officials are entitled to qualified immunity unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To avoid subjecting officials to the distraction and deterrence of unnecessary trials, this Court has emphasized that summary judgment should be granted to a § 1983 defendant on qualified immunity grounds "if discovery fails to uncover evidence sufficient to create a genuine issue of whether defendant in fact . . . violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This Court made clear that for qualified immunity protection to be lost, "the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). But the Eighth Circuit here recognized that there was not a case "on all fours" to its

holding, and that, in fact, published decisions take a contrary view. App. A-5. Nevertheless, it denied qualified immunity, saying that the theory was "not obscure" (App. A-9).

"Not obscure" is not the test for qualified immunity protection.

The appellate court also asserted that its "chain of reasoning" leading to a constructive-involuntary commitment status "would have been apparent to a reasonable state official" (App. A-9). It made this assertion even though such a chain had never previously been forged. The court did not explain how a "reasonable state official" would have found it "apparent" when it was not apparent enough to have worked its way into any opinion despite the existence of similar statutes in nearly every state. We have found no cases where a just born legal theory was found to have been "apparent." Presumably, no such cases were found by respondents or the Eighth Circuit.

If qualified immunity is not available in a case like this, the barrier has become so porous that it no longer provides the protection to government officials sued in their individual capacities that this Court has found necessary and important.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-1531EM

Wayne Kennedy and Alice Kennedy,	*	
Appellants,	*	
v.	*	
C. Keith Schafer; John Twiehaus; Robert O. Muether; Jacqueline Howard; Kelly Shaw; and Peggy J. Dunlap,	*	On Appeal from the United States District Court for the Eastern District of Missouri.
Appellees.	*	

Submitted: September 14, 1995

Filed: December 4, 1995

Before RICHARD S. ARNOLD, Chief Judge, HEANEY and HANSEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

Wayne and Alice Kennedy brought this suit under 42 U.S.C. § 1983 against officials of the Missouri Department of Mental Health and Hawthorn Children's Psychiatric Hospital, a state facility. They allege that defendants deprived their 15-year-old daughter, Kathleen, of her due-process right to a safe and humane environment while she was a patient at Hawthorn. That deprivation, they assert, led to Kathleen's suicide. The District Court granted the defendants' motion for summary judgment, holding that, because Kathleen was voluntarily admitted to Hawthorn, she had no "liberty interest" in a safe and humane environment, thus precluding liability under Section 1983. We reverse that order because there is a genuine issue of fact concerning whether Kathleen, at the time of her death, was a voluntary patient.

I.

At this preliminary stage of the case, we accept the Kennedys' version of the facts. In October of 1991, Kathleen was admitted to Hawthorn as a voluntary inpatient at her parents' request. Immediately before Kathleen's admission to Hawthorn, she had been a psychiatric inpatient in a private hospital. Her parents' insurance coverage had been exhausted, necessitating the move. The Kennedys had been advised that, if they did not voluntarily admit Kathleen to a mental-health facility, Kathleen would be involuntarily committed. The only affordable option open to them was a state-run facility where they would be charged in accordance with their ability to pay. Thus, Kathleen was admitted into Hawthorn, a state facility.

Kathleen remained an inpatient at Hawthorn for several months. On March 30, 1992, due to her mental condition and her expressed desire to commit suicide, she was placed on the precaution "1:1 Constant Staff Supervision." Patients under this precaution must be within the eyesight of, and no more than three feet away from, staff members at all times. On April 3, 1992, Kathleen was placed on "Protective Suicide Precautions." This precaution is for patients who are at a "moderate to low risk" for suicide, and requires nursing staff members to keep the patient "in constant eye-sight." Additionally, the nursing staff must directly interact with these patients every 15 to 20 minutes so that changes in their mental status or behavior may be detected.

Kathleen remained under Protective Suicide Precautions on the evening of April 8, 1992. That day, the staff in Cottage D, where Kathleen was residing, told Hawthorn's nursing supervisor, defendant Peggy Dunlap, that the number of nurses assigned to work the evening shift was inadequate to meet the patients' needs. Dunlap failed to find additional help, and, in fact, declined an offer by the day-shift supervisor to help locate additional nursing assistance. Compounding the problems, the charge nurse in Cottage D who was responsible for assigning a staff member to care for Kathleen failed to do so. This charge nurse was, at the time, on extended probation because of her past deficiencies in assigning work duties to the nursing staff.

The evening shift began duty at 2:30 p.m. on April 8. Kathleen was not in the "constant eye-sight" of any nursing staff member. No one interacted with her every 15 to 20 minutes. When someone finally checked on her at 5:10 p.m., she was dead, hanging from a bed sheet in her room.

The Kennedys allege that these staffing problems were nothing new for Hawthorn. They assert that employees had complained about the chronic under staffing on several occasions. Moreover, they claim that Hawthorn officials falsified records, causing the staffing needs of the hospital to appear to be less than they actually were. These actions, they contend, establish a pattern of deliberate indifference to the health and safety of Hawthorn's patients. This deliberate indifference, in turn, deprived their daughter of her constitutionally protected liberty interest in a safe and humane environment.

The District Court held that the defendants were entitled to summary judgment on two grounds. First, it held that Kathleen had no constitutionally protected liberty interest because she voluntarily entered Hawthorn. Second, even if Kathleen did have a protected liberty interest, that right was not clearly established at the time of her death, thus entitling the defendants to qualified immunity.

II.

The Due Process Clause of the Fourteenth Amendment ensures that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The Supreme Court has held that the "deprivation of liberty" which triggers "the protections of the Due Process Clause" is "the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty." DeShaney v. Winnebago Cty. Dept. Soc. Servs., 489 U.S. 189, 200 (1989). This Court has interpreted DeShaney as "impos[ing] a duty on state actors to protect or care for citizens" when one of two circumstances exists. Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), cert. denied, 113 S.

Ct. 1265 (1993). The first exists when the state limits an individual's ability to care for himself in a "custodial [or] other setting[ ]." Ibid. The second exists when the state exposes one to danger that he would not have faced otherwise.

The District Court's order and the majority of the parties' arguments in this Court have focused on whether a voluntary patient in a state mental hospital could ever have his "ability to care for himself" so limited as to create a liberty interest in a safe and humane environment. The Kennedys argue that the manner in which a patient enters a hospital is not the dispositive question. Rather, they encourage us to look to the amount of control the state actors, here hospital employees, exerted over Kathleen's life. Cf. Walton v. Alexander, 44 F.3d 1297, 1306 (5th Cir. 1995) (en banc) (Parker, J., concurring specially). If we do so, they say, it will become apparent that no distinction should be made between voluntary mental patients and involuntary mental patients, who unquestionably do have a protected liberty interest in a safe and humane environment. See Youngberg v. Romeo, 457 U.S. 307 (1982).

The argument may have merit. In fact, this Court accepted it before DeShaney. See Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978). Nevertheless, other circuits, after DeShaney, have refused to grant due-process protection to those who voluntarily entered the State's custody. See Walton, supra; Monahan v. Dorchester Counseling Center, 961 F.2d 987 (lst Cir. 1992); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3rd Cir. 1991). Armed with these cases, the defendants argue that Parwatikar has been overturned by DeShaney. We, of course, are not bound by these cases, and the case before us could, conceivably, be distinguished given Kathleen's youth and mental state. We need not address this issue, however,

because the question was sufficiently doubtful, viewed from the perspective of a reasonable state official at the time of Kathleen's death, to make it impossible for us to say that the law was clearly established at that time in favor of the existence of a due-process right on the part of a voluntarily admitted patient. In other words, we agree with the District Court that defendants are entitled to the defense of qualified immunity if Kathleen is properly classified as a voluntary patient. We need not and do not decide whether Parwatikar's holding in favor of voluntary patients' due-process rights remains good law. We do decide that an action for damages brought by a voluntary patient is subject to a qualified-immunity defense.

This holding is not the end of the case, however. Voluntary mental patients in Missouri may be released upon request, or, if they are minors, upon the request of their parents. Mo. Rev. Stat. § 632.155(1). But if the head of the facility where a minor is a patient "determines that the minor is mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others, the head of the facility may refuse the release." Mo. Rev. Stat. § 632.155(2). Included in the definition of "serious physical harm" is "a substantial risk that harm will be inflicted by a person upon his own person, as evidenced by recent threats, including verbal threats, or attempts to commit suicide or inflict physical harm on himself." Mo. Rev. Stat. § 632.005(9)(a). Notably, the application for admission signed by Kathleen's mother upon her admission to Hawthorn repeats this statutory language nearly verbatim.

This language indicates that once Kathleen was placed on Protective Suicide Precautions she may have effectively become an involuntary patient. Certainly she no longer had the absolute right to leave the hospital by simply requesting to be released. The defendants argue that it is

mere conjecture to try to determine what Hawthorn officials would have done if Kathleen had requested to leave. We doubt that they would have released a patient who presented a risk of suicide so great that her doctors required the nursing staff to keep her constantly in their sight. Moreover, what defendants would have done if Kathleen's parents had tried to take her out of the hospital is not the only issue at stake. At the oral argument before this Court, the defendants stated that Kathleen would almost certainly have been released under certain circumstances, to another institution or to a home-health care arrangement, for example. But that is exactly the point. She would have been required to make some showing before she could have been released. She had no absolute right to leave.

The record before us, however, is not sufficient to allow us to conclude, as a matter of law, that Hawthorn had so restrained Kathleen's "freedom to act on [her] own behalf -- through incarceration, institutionalization, or other similar restraint of liberty" that the "protections of the Due Process Clause," DeShaney, supra, 489 U.S. at 200, were triggered. Presumably, the record is sparse because the defendants and the District Court believed that Kathleen's status upon admission was dispositive. On remand, it should be determined whether Kathleen's condition at the time of her death presented such a "likelihood of serious physical harm" that Hawthorn could lawfully have detained her if either she or her parents had requested her release. If so, the "situation" that she was in was "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." DeShaney, 489 U.S. at 201 n.9.

As we have noted, this disposition makes it unnecessary to address the question whether a voluntary mental patient enjoys the same due-process protections as an involuntary patient. It is prudent, and in keeping with the

precedents, to postpone consideration of this difficult constitutional question until we are certain that its consideration is necessary. Cf. Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

III.

Our Brother Hansen suggests, post at 11, that our reasoning "create[s] a constitutional right to involuntary commitment status whenever a patient's condition is such that she could lawfully be detained." With respect, we believe that this characterization of our holding is mistaken. We hold only that a Missouri statute may effectively restrain those in Kathleen's condition and under the care of the State from acting on their own behalf to such an extent as to trigger the protections of the Due Process Clause. It is not Kathleen's worsening medical condition alone that may have converted her status to that of an involuntary patient. Rather, her worsening condition plus the duty placed on state officials by the statute may have had this effect.

In this connection, another statute, Mo. Rev. Stat. § 632.300, is relevant. Under this provision, if the defendants had become aware of Kathleen and her condition while she was outside their care, they would have been required to investigate and evaluate her condition. Mo. Rev. Stat. § 632.300(l). If they had determined that she posed a "likelihood of serious physical harm" to herself and that that harm was "imminent," they would have been required to commit her involuntarily. Mo. Rev. Stat. § 632.300(2). By a parity of reasoning, a patient already in custody as the result of a voluntary commitment surely has no absolute right to be released when her condition has worsened in the way that Kathleen's did in this case.

The dissenting opinion also suggests that, even if Kathleen had become an involuntary patient, defendants would have a qualified-immunity defense. It is true enough that there is no case on all fours, at least none that we have found. But the precedent in this Circuit, in the form of the Parwatikar case, discussed above, is clear at least that involuntary patients have due-process rights. No one contends that DeShaney or any other case has impaired or cast doubt on this aspect of our holding in Parwatikar. We see no reason why a patient originally committed voluntarily must retain that status permanently. Facts change, and legal status follows facts. This chain of reasoning is not obscure and, we think, would have been apparent to a reasonable state official at the time of the events that gave rise to this case.

IV.

The judgment of the District Court is reversed. A genuine question of material fact exists concerning whether Hawthorn had restricted Kathleen's ability to act on her own behalf to such an extent that she had become, in effect, an involuntary patient. The cause is remanded for further proceedings consistent with this opinion.

HANSEN, Circuit Judge, dissenting.

I respectfully dissent. Our court remands for further findings concerning whether Kathleen Kennedy's change in mental condition and course of treatment may have effectively converted her status from that of voluntary patient to involuntary patient. If so, then the court states that this situation is sufficiently similar to incarceration or institutionalization to give rise to § 1983 liability for a failure to protect. My dissent is twofold: First, I fail to see any disputed facts that might indicate that Kathleen's patient

status changed from voluntary to involuntary, and second, even if there is a genuine dispute of fact on this issue, I believe that the imposition of liability arising from such a de facto change in status was not clearly established law at the time of this tragedy.

In order to give rise to a constitutional duty to protect, both DeShaney, 489 U.S. at 199-200, and our opinion in Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993), require a showing that the state by some "affirmative exercise of its power" restrained an individual's liberty against her will and rendered her unable to care for herself. In my opinion, after DeShaney, the voluntary admission of a mental patient does not result in the required state-imposed restraint of liberty, against the patient's will, that is necessary to establish liability for failure to protect. Nor can the worsening of the patient's mental condition and a change of treatment modality to more frequent observations substitute for the affirmative exercise of liberty-restraining state power.

It is undisputed that at the time of her admission, Kathleen was a voluntary mental patient. She was admitted, not committed. Her course of treatment required that she be placed under Protective Suicide Precautions, a medical status which mandates frequent interaction with and constant supervision by staff members. This medical status, which was part of her voluntarily requested treatment, is the only possible showing of an affirmative exercise of state power that can be found in this case. Our court's opinion concludes that there might be an issue of fact by speculating that once Kathleen was placed under Protective Suicide Precautions she may have effectively become an involuntary patient because her mental condition was such that if her parents had requested her release, the director could (not would) have exercised his discretion to refuse

her release. Finding no facts to support this speculation, I respectfully disagree.

Under Missouri law, it is possible that a voluntary minor patient's admission status may change to that of an involuntarily detained patient if the minor patient or her parents request her release, and the release is denied. By statute, the head of a facility "may refuse" the release of a voluntarily admitted minor patient when the patient is both "mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others," but may do so only if an application for detention is made to a Missouri court. Mo. Rev. Stat. § 632.155(2). This statutory authority to refuse the release of a voluntarily admitted minor patient, however, is discretionary with the head of the facility, not mandatory upon a showing of the requisite mental condition. In that respect I disagree with the court's characterization of this provision as a "duty placed on state officials." Ante. at 7. Until the head of a facility is presented with the opportunity and actually exercises the authority to refuse the release of a voluntary minor patient, the state has not taken any affirmative action to restrain the voluntary patient's liberty against her will within the meaning of DeShaney. Importantly, the record in this case contains no assertion or evidence that Kathleen's course of treatment was against Kathleen's will or her parents' will, or that her parents sought to remove Kathleen and were denied release from this course of treatment.

Instead of pointing to disputed facts that might demonstrate an affirmative exercise of power by the state, our court's opinion suggests that the status of a patient can change automatically from voluntary to involuntary whenever the patient's condition is both "mentally disordered" and poses a "likelihood of serious physical harm" to herself or to others as described in Mo. Rev. Stat.

§ 632.155(2), such that the director "could lawfully have detained her if either she or her parents had requested her release." Ante at 7 (emphasis added). Under this reasoning, the mere treatment of a serious mental condition which falls within the terms of the statute becomes a state-imposed restraint of liberty. If this be true, then I fear that we have effectively obliterated the rule that a duty to protect arises only when the state affirmatively exercises its power to restrain a person's liberty against the person's will. See DeShaney, 489 U.S. at 200; Dorothy J., 7 F.3d at 732.

Furthermore, the de facto evolution from voluntary to involuntary status based upon a worsening medical condition as suggested by our court would actually create a constitutional right to involuntary commitment status whenever a patient's condition is such that she could lawfully be detained. This cannot be. There is no constitutional right to involuntary commitment, regardless of an individual's mental condition. See Wilson v. Formigoni, 42 F.3d 1060, 1066 (7th Cir. 1994).

Our court's opinion, ante, at 7, asserts that Rev. Mo. Stat. § 632.300(2) (requiring a mental health coordinator to "request a peace officer to take or cause [a] person to be taken into custody and transported to a mental health facility" if the mental health coordinator has reasonable cause to believe that the likelihood of serious physical harm by such person to himself or others as a result of a mental disorder is "imminent") creates a duty which, by parity of reasoning, indicates that a patient with similar mental health problems already at the facility has no absolute right to release. Here again our court substitutes the mere existence of unexercised state power for the reality of affirmative state action. Kathleen's parents were absolutely free to remove her from the hospital unless and until a state actor exercised the power to detain her authorized by the

Missouri statute. In my opinion, neither the possibility for detention under this statute nor the reasoning employed by our court can create affirmative state action in a case where none in fact has occurred. Although "[f]acts change," ante, at 8, and although the facts of a given case could indicate a change from voluntary to involuntary status if they included an actual decision to detain made under the statute, I maintain that unless the facts of a case indicate that the state has affirmatively acted to restrain a person's liberty, they are insufficient to subject state actors to § 1983 liability. An unexercised discretionary power under state law to detain and evaluate a person with apparent mental health problems is not the kind of affirmative state action DeShaney requires as a prerequisite to § 1983 liability.

To summarize, Kathleen was voluntarily admitted, not committed, and there is no evidence to suggest that her status as a voluntary patient actually changed before her tragic and untimely death. Her parents did not request her release, there is no indication that she was restrained against her will or her parents' will, and there is simply no dispute of fact to suggest any affirmative exercise of power by the state that was keeping Kathleen restrained of her liberty at the time of her death.

Even assuming arguendo that it is possible to demonstrate a question of fact concerning whether Kathleen's worsening condition combined with more frequent medical observation resulted in an affirmative state act restraining Kathleen's liberty in a manner similar to that of involuntary institutionalization, the qualified immunity defense remains available because this certainly would be new law since DeShaney, and it cannot be said to have been clearly established at the time of Kathleen's death. My research has revealed no cases indicating constitutional

liability in this type of situation after DeShaney and prior to the filing of this opinion.

For these reasons, I would not remand for more factual inquiry but would affirm the district court's grant of qualified immunity.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1531EMSL

Wayne Kennedy; et al.,	*	
	*	
Appellants,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestions for
C. Keith Schafer, et al.,	*	Rehearing En Banc
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman, Judge Wollman, Judge Beam, and Judge Hansen would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

January 31, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WAYNE KENNEDY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:93CV1818 TIA
	)	
C. KEITH SCHAFER, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' Motion to Dismiss or for Summary Judgment. The parties agreed to try their case before the undersigned pursuant to 28 U.S.C. §636(c).

Plaintiffs seek damages for the death of their daughter, Kathleen Kennedy, pursuant to 42 U.S.C. §1983. The defendants include C. Keith Schafer, Acting Director of the Missouri Department of Mental Health ("MDMH"), John Twiehaus, Director of Development of Comprehensive Psychiatric Services for MDMH, Robert Muether, Regional Manager of the East Regional Division of Comprehensive Psychiatric Services for MDMH, Jacqueline Howard, Executive Director of Hawthorn Children's Psychiatric Hospital, Kelly Shaw, Hawthorne's Director of Nursing, and Peggy Dunlap, Nursing Supervisor at Hawthorne.

Background[1]

In October of 1991, plaintiffs voluntarily admitted their minor daughter, Kathleen Kennedy, to Hawthorne Children's Psychiatric Hospital. Kathleen remained at Hawthorn on an inpatient basis for several months, residing in "Cottage D."

On April 3, 1992, a staff psychiatrist ordered that Kathleen be placed on Protective Suicide Precautions ("PSP"), a status for patients at moderate to low risk for suicide. Hawthorne policies require that staff keep PSP patients in eyesight at all times, and that nursing staff directly interact with them every 15-20 minutes to note changes in mental status or behavior. Additionally, nurses are required to document their observations on a "suicide-homicide-elopement precautions" flow sheet.

On the evening of April 8, 1992, the staff assigned to Cottage D requested additional help from Peggy Dunlap, the nursing supervisor. Dunlap failed to provide additional help. Furthermore, Dunlap refused an offer of assistance in locating additional help from the day shift nursing supervisor.

Lula Franklin, a nurse on extended probation due to deficiencies in her performance related to assignment of work staff, was placed in charge of Cottage D and another cottage on April 8, 1992. In violation of Hawthorne policy, Franklin failed to assign any responsibility for the care of Kathleen Kennedy.

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[1] For the purposes of deciding this motion, the undersigned accepts as true plaintiffs' version of the relevant facts.

No one interacted with Kathleen from 2:30 p.m. (when the evening shift began) until 5:10 p.m., when she was found hanging by a bedsheet in her room.

Plaintiffs allege that MDMH employees engaged in patient care had complained of chronic understaffing at Hawthorn prior to the date of Kathleen's death. Additionally, they assert that Hawthorn officials falsified acuity sheets, thereby misrepresenting the needs of the hospital. Plaintiffs contend that the failure of Lula Franklin to assign responsibility for Kathleen's care and the failure to keep her in sight or interact with her was known or should have been known to all defendants, and that defendants knew or should have known that staff were often incapable of complying with hospital policies due to staff shortages. Further, they assert that Kathleen had a clearly established liberty interest in a safe and humane environment. Plaintiffs charge that defendants recklessly and callously disregarded their duty to protect Kathleen from self-inflicted injury and death. They seek compensatory and punitive damages, as well as attorney fees.

Defendants argue that as a voluntary patient at Hawthorne, Kathleen Kennedy did not have a protected liberty interest. Furthermore, they contend that they are entitled to qualified immunity because any liberty interest Kathleen had was not clearly established at the time of her death.[2]

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[2]Defendants' third point, that Diana Mabry was listed only in the caption of the complaint, is moot. The Court granted plaintiffs leave to amend their complaint on November 15, 1993 to substitute Peggy Dunlap's name for Diana Mabry's.

Discussion

As employees of the Missouri Department of Mental Health, defendants are shielded from §1983 liability for damages arising from their discretionary conduct unless such conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Eighth Circuit "applies a flexible standard" in determining whether a right is clearly established, "requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles." Norfleet v. Arkansas Department of Human Services, 989 F.2d 289, 291 (8th Cir. 1993) (quoting J.H.H. v. O'Hara, 878 F.2d 240, 243 (8th Cir. 1989). Therefore, this Court must determine whether, on April 8, 1992, a reasonable official would have understood that the state had a duty to protect a voluntary inpatient at a mental hospital from self-inflicted bodily harm or death, and that a breach of such duty violated the Due Process Clause.

The first step in determining whether defendants violated a clearly established right is to determine whether plaintiff has asserted a violation of a constitutional right at all. Brown v. Nix, ___ F.3d ____, 1994 WL 460815 (8th Cir. 1994). Two Supreme Court cases are instructive on this issue. In Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Supreme Court held that the plaintiff, involuntarily committed to a state institution for the mentally retarded, had a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement. However, in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.3d 249 (1989), the Court declined to extend

due process protection to a minor outside of state custody who was injured by private violence.

The DeShaney case concerned a suit against a county department of social services and its social workers for failing to remove a child from his father's custody in spite of evidence that the child was being beaten by his father. The child eventually suffered severe brain damage rendering him profoundly retarded as a result of his father's abuse. The Court found that the defendants' actions did not violate due process because "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." DeShaney, 109 S.Ct. at 1006. Thus, the state's "affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty" triggers due process protection, rather than the failure to protect the individual from "harms inflicted by other means." Id.

Courts have interpreted DeShaney to mean that voluntarily committed patients such as Kathleen Kennedy generally do not have due process rights to reasonable care and safety. See Monahan v. Dorchester Counseling Center, Inc., 961 F.2d 987 (lst Cir. 1992) (no due process protection for voluntary mental health patient injured when he jumped out of a van driven by state employee); Johnson V. Thompson, M.D., 971 F.3d 1487 (10th Cir. 1992) (infant born with spina bifida at state hospital could not recover for violation of substantive due process rights based on denial of medical treatment); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3rd Cir. 1991) (denying claim brought by parents of voluntarily committed patient who died due to alleged negligence of facility staff). Thus,

defendants argue that plaintiff, as a voluntary patient at Hawthorne, had no due process protection against private violence.

Plaintiffs assert that the pivotal question in this case is not whether Kathleen was admitted voluntarily, but whether defendants made her more vulnerable to injury by accepting her as an inpatient at an allegedly understaffed hospital where she would not receive adequate supervision. Plaintiffs rely on the following language from the DeShaney decision, "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 109 S.Ct. at 1006.

The Eighth Circuit has held that there are two exceptions to DeShaney's "general rule that the State has no duty to protect its citizens from private harmdoers." Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993). The first exception arises where the state affirmatively acts to restrain the individual's freedom, Dorothy J., 7 F.3d at 732, citing DeShaney, 109 S.Ct. at 1006; the second occurs when the state affirmatively places an individual in a position of danger the individual would not otherwise have faced. Dorothy J., 7 F. 3d at 733, citing Gregory v. City of Rogers, Arkansas, 974 F.2d 1006, 1010 (8th Cir. 1992).

In this case, the undersigned finds that the first exception does not apply because Kathleen was voluntarily committed to Hawthorn by her parents.[3] Plaintiffs argue

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[3]Cf. Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994) and Spivey v. Elliot, 29 F.3d 1522 (11th Cir. 1994), where the courts held that the state had a duty to protect voluntarily admitted handicapped students at residential schools; programs had custodial components,

that defendants may not have released Kathleen on the date of her death because she was potentially suicidal. Such speculation is insufficient to overcome the fact that plaintiffs voluntarily chose to commit Kathleen. Additionally, plaintiffs' contention that they felt pressured to commit Kathleen in order to avoid involuntary commitment and possible marginalization of their parental rights, while compelling, is nevertheless irrelevant. The undersigned finds no evidence in this case of the state taking affirmative action to obtain custody of Kathleen.

Thus, the question is whether defendants affirmatively placed Kathleen Kennedy in a position of danger that she otherwise would not have faced. To this question, the undersigned must answer no. While this case is tragic, the fact remains that the Missouri Department of Mental Health did not create Kathleen's mental state; her treatment at Hawthorne did not place her in a position of danger she otherwise would not have faced.

Even assuming, however, that MDMH had a constitutionally established duty to protect Kathleen from suicide, such duty was not clearly established on April 8, 1992. Plaintiffs point to the case of Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978), which held that voluntarily and involuntarily committed patients, once admitted, had a constitutional right to a basically safe and humane living environment. Id. at 804. The undersigned does not accept plaintiff's contention that Goodman continued to represent clearly established law in this circuit after DeShaney. Although the Eighth Circuit has not

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especially since students' ages and handicaps made them dependent on the schools for their basic needs. In both cases, however, the defendants were entitled to qualified immunity. Walton, 20 F.3d at 1356; Spivey, 29 F.3d at 1527.

expressly overruled Goodman, it recognizes only two instances where the state may be held liable for private violence (discussed supra); neither of those instances would apply to this case. Moreover, as discussed supra, many circuits have specifically considered the issue and determined that DeShaney's rationale mandates a distinction between voluntary and involuntary patients. Thus, a reasonable state official would not have understood on April 8, 1992 that the state had a constitutionally imposed duty to protect a voluntary patient from self inflicted harm.

Accordingly,

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment filed on October 25, 1993 (#20-1) is **GRANTED**.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss filed on October 25, 1993 (#20-2) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss or for Summary Judgment filed on October 7, 1993 (#17-1 and 17-2) is **DENIED AS MOOT**.

/s/ Terry I. Adelman
TERRY I. ADELMAN
UNITED STATES MAGISTRATE JUDGE

Dated this 25th day of January, 1995.